Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996

CC Docket No. 96-98

REPLY COMMENTS OF THE NEW JERSEY CABLE TELECOMMUNICATIONS ASSOCIATION, THE SOUTH CAROLINA CABLE TELEVISION ASSOCIATION, AND THE TEXAS CABLE & TELECOMMUNICATIONS ASSOCIATION

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INTRODUCTION AND SUMMARY

These reply comments address a single issue: the scope of the Commission's authority to adopt nationally applicable regulations, binding on the states, to implement Sections 251 and 252 of the Communications Act.[1] Several regional Bell Operating Companies ("RBOCs"), GTE, numerous state regulatory bodies, and the National Association of Regulatory Utility Commissioners ("NARUC") have argued that the 1996 Act does not permit this Commission to fashion such uniform nationally applicable rules.[2] The most that the Commission may do, these parties argue, is to articulate certain general principles that individual state regulatory bodies might

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[1] 47 U.S.C. §§ 151 *et seq.* (the "Act"), as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Act").

[2] ***See, e.g.,*** Comments of NARUC ("NARUC Comments") at 6 - 21; Comments of GTE Service Corp. at 2 - 7; Comments of Bell Atlantic ("Bell Atlantic Comments") at 2 - 8; Comments of Maryland Public Service Commission ("MDPSC Comments") at 13 - 25.

consider in the course of their review of particular interconnection arrangements under Section 252.[3]

The undersigned state cable and telecommunications associations respectfully disagree with this claim.[4] It is clear from both the language and structure of the 1996 Act, and from the relationship of the 1996 Act to the pre-existing Communications Act, that Congress intended to impose federal standards on the regulation of local exchange markets to the extent needed to meet its newly articulated goal of promoting local exchange competition. It is also clear that Congress placed the responsibility for adopting the framework necessary to make this goal a reality on this Commission, not on the states.[5]

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[3] In the alternative, NARUC and others argue that, even if the Commission has the authority to issue nationally binding regulations, it should not do so. ***See, e.g.,*** NARUC Comments at 22 - 29; Comments of New York State Dept. of Public Service at 22 - 29. The undersigned associations disagree with this position for the reasons stated in the comments of the National Cable Television Association ("NCTA"), and others, and believe that nationally binding regulations would materially advance the development of local exchange competition. ***See*** Comments of NCTA at 3 - 8; Comments of AT&T at 3 - 14; Comments of Continental Cablevision at 16; Comments of TCI at 5 -6; Comments of Jones Intercable at 9 - 13. This pleading, however, does not address the question of what nationally binding regulations the Commission should adopt.

[4] The undersigned associations are the trade associations of the cable television industry in their respective states, and have participated in various proceedings before the bodies with responsibility for telecommunications regulation in those states. In this regard, Congress expressly recognized that cable television operators would have an important role to play in the development of truly competitive local exchange markets. S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 148 (1996) ("Joint Explanatory Statement").

[5]Notwithstanding the comments of NARUC, the South Carolina Public Service Commission ("SCPSC") has held in abeyance its ongoing local competition proceedings until the last quarter of 1996, in order to have the benefit of federal regulations implementing the 1996 Act to guide its own efforts to further open South Carolina's telecommunications markets to competition. *In Re Generic Proceeding to Address Local Competition in the Telecommunications Industry in South Carolina,* Docket No. 96-018-C, Order No. 96-364 (SCPSC May 20, 1996)(Attachment).

This conclusion is consistent with ***Louisiana PSC v. FCC,*** 476 U.S. 355 (1986). That decision did not elevate Section 2(b) of the Communications Act (47 U.S.C. § 152(b)) — which contains the rule that intrastate services are subject to state-level regulation — above all other aspects of the Act as an indicator of congressional intent. Instead, as the Court noted there, "[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." 476 U.S. at 369. In the area of setting the ground rules for local exchange competition, the only plausible reading of Part II of Title II (new Sections 251-261) is that Congress intended precisely that result.

This conclusion is also consistent with Section 2(b) itself. The basic rule of Section 2(b) remains unchanged by the new law. State regulators continue to have the power to set the rates for intrastate services; to set the non-price terms and conditions associated with such services; to regulate matters such as accounting and other reporting requirements regarding intrastate operations; depreciation of assets assigned to the intrastate jurisdiction; billing practices for intrastate services; and customer service requirements; to establish intrastate mechanisms for the preservation of universal service; and, indeed, to decide whether to regulate intrastate services under a regime of traditional rate-of-return regulation, under some variant of price cap or "incentive" regulation, or under some other regulatory model.

The recitation of these broad areas of continued state authority helps place the new law into perspective. State regulators' authority over intrastate services, and over the intrastate operations of local exchange carriers (LECs), is no less pervasive today than before the 1996 Act. While the change from a presumption of monopoly local exchange markets to a presumption of robust competition is indeed dramatic, the fact remains that the 1996 Act focused on a relatively few areas that Congress believed to be critical to the development of such competition — interconnection, unbundling, resale, and fair access to monopoly facilities. It is only in these areas that Congress has

occupied the field and assigned regulatory responsibility to this Commission. Nothing in this congressional action remotely conflicts with the general operation of Section 2(b), and nothing in Section 2(b) suggests that this Commission should be hesitant in fulfilling the responsibilities that Congress has placed on it.

Finally, while it is clear that Congress has placed responsibility for defining the scope and content of Sections 251 and 252 on this Commission, nothing in the Act indicates that Congress was trying to push the states aside in the move to competitive local exchange markets. To the contrary, the new law gives state regulators an enormous amount of work to do to accomplish that purpose. For example, state regulators are to mediate and arbitrate interconnection disputes, review negotiated agreements, and review "statements of generally available terms" (in each case, however, under the terms of the ***federal*** law). Also, the law expressly reserves to the states their right to voluntarily undertake even more extensive regulatory activities peculiar to their own situations, subject only to the condition that those activities remain consistent with the pro-competitive framework established by the law and by this Commission's regulations. Moreover, state regulators have been entrusted with the important task of determining whether small and rural local exchange carriers have met the law's standards for being exempted from the requirements generally applied to incumbent LECs. Congress clearly placed considerable faith in the willingness and ability of state regulators to shoulder significant and challenging responsibilities in a joint effort to make local exchange competition a reality. The undersigned associations look forward to continuing to work with the regulators in their respective states as part of that effort.

The remainder of this pleading is organized as follows. Section I focuses specifically and in detail on the language of Sections 251 and 252. It shows that Congress intended the Commission to adopt regulations defining the scope of LECs' obligations under those provisions; that those regulations should include rules for

determining the appropriateness of particular pricing regimes, based on the pricing standards included in Section 252(d); and that those regulations are fully binding on the states. Section II takes a broader focus and shows that nothing in the conclusions drawn in Section I conflicts with Section 2(b) of the Act, with ***Louisiana PSC v. FCC,*** or with Section 601(c)(3) of the 1996 amendments to the Act.

I. THE LANGUAGE AND STRUCTURE OF THE 1996 ACT CLEARLY SHOW THAT THE COMMISSION HAS PLENARY AUTHORITY TO ADOPT REGULATIONS TO DEFINE AND CONTROL THE IMPLEMENTATION OF CARRIERS' DUTIES UNDER SECTIONS 251 AND 252.

No one seriously questions that Congress has the authority to establish preemptive federal rules regarding local exchange competition.[6] The only real question is whether Congress has chosen to exercise that authority in the 1996 Act, and, in particular, in Sections 251 and 252 of the new law. As the Supreme Court observed in

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[6] The New York State Dept. of Public Service ("NYDPS"), and the City of Bogue, Kansas, suggest that the provisions of the Act that can be construed to give this Commission the authority to direct states or localities to take specific actions violate the Tenth Amendment. ***See*** Comments of Bogue, Kansas at 3-4 & nn. 2-3; Comments of NYDPS ("NYDPS Comments") at 5. This claim is utterly baseless, for the reasons explained by Classic Telephone in the ongoing dispute under Section 253 of the Act between Bogue and Classic regarding preemption of Bogue's failure to grant Classic a telephone franchise. *See generally* Classic Telephone Petition for Preemption, CCBPol 96-10, filed March 19, 1996; Classic Telephone Reply Comments, CCBPol 96-10, filed May 10, 1996; FCC Public Notice DA96-435 (March 26, 1996). Oddly, where most state regulatory bodies addressing the issue claim that Congress may not divest states (or localities) of the right to establish regulations regarding local exchange competition, Bogue (and New York) seems to be arguing that Congress lacks to power to require states (or localities) to implement such regulations. Both of these positions, of course, ignore the impact of the Commerce Clause, U.S. Const. Art. I, § 8, and the Supremacy Clause, U.S. Const., Art. VI, cl. 2, which in combination give Congress complete authority to determine how matters that affect interstate commerce are to be regulated. Absent a claim that local exchange telecommunications does not affect interstate commerce — and any such claim would be utterly implausible on its face — Congress's constitutional authority to regulate local exchange telecommunications is plenary.

Louisiana, "[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." 476 U.S. at 369.

This section of these Reply Comments shows that the only reasonable conclusion to draw from the specific language and structure of the new law is that Congress indeed intended such a result here. Focusing specifically on Sections 251 and 252, this section explains why the Commission's authority to issue regulations, granted in Section 251(d)(1), necessarily includes the authority to consider the pricing standards of Section 252(d), and why those regulations are binding on the states in their application of those pricing standards.

A. The Commission's Regulations Under Section 251(d)(1) Are Binding On The States In Proceedings Under Section 252.

Section 251(d)(1) is the clearest source of Commission authority to promulgate regulations that define and clarify the scope of the duties and obligations of Sections 251 and 252. That provision states that "[w]ithin 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section." This is the language of command: Congress has ***directed*** this Commission to "establish regulations to implement the requirements of this section," i.e., Section 251, and, indeed, to do so by August 8 of this year.[7]

There can be no question that the regulations the Commission adopts under Section 251(d)(1) are binding on the states. This is most clearly seen in Section

[7] Some have argued that no regulations are "necessary" under Section 251 because the statute itself is clear enough. Even a cursory review of the sometimes radically different positions taken in this proceeding demonstrates, if any doubt existed, that clarifying regulations are, indeed, required.

251(d)(3), which provides that, "in prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission" that meets three specified criteria. This provision would be wholly unnecessary if other provisions of the law did not grant the Commission the power to override state "regulations, orders or policies" with which it disagreed. The existence of the Section 251(d)(3) limitation, therefore, shows that — outside of that limitation — the Commission's authority to issue regulations that are binding on the states is plenary.[8]

The criteria which define the relatively narrow class of state "regulations, orders or policies" that this Commission may not set aside also illustrate the broad scope of this Commission's authority. State-level rules may be overridden unless they (a) "establish[] access and interconnection obligations of local exchange carriers" and (b) are "consistent with the requirements of this section" and (c) do not "substantially prevent implementation of the requirements of this section and the purposes of this part." Clearly, Section 251(d)(3) is intended to give states that have adopted rules regarding LECs' "access and interconnection obligations" a certain amount of leeway. But even these state-level rules can be set aside if they conflict with ***this Commission's*** interpretation of Section 251 or its understanding of "the purposes of" Part II of Title II, i.e., the promotion of local exchange competition.[9] This means that even state access

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[8] Another source of Commission authority in this regard is Section 1 of the Act, 47 U.S.C. Section 151, which directs the Commission to "execute and enforce the provisions of this Act." This provision now applies to Part II of Title II, including of Sections 251 and 252. Under Section 1, therefore, the Commission is now obliged to "execute and enforce" the new federally-imposed requirements of Sections 251 and 252. There can be no doubt that promulgating regulations that clarify and define the terms of those statutes, in light of the Commission's expertise regarding the telecommunications industry, falls within that mandate.

[9] As the Commission has recognized, the key "purpose" of Part II is the development of competitive local exchange markets. In the 1996 Act, "Congress sought to establish 'a pro-competitive, de-regulatory national policy framework' for the United States
(continued...)

and interconnection regulations that are seemingly "consistent with the requirements of" Section 251 when viewed in isolation can be set aside if, in the Commission's judgment, those regulations would interfere with the development of competitive local exchange markets.[10]

The fact that the Commission's regulations under Section 251 are binding on state commissions is clear from Section 252. That section directs state commissions to undertake four functions under the new law. First, they are called upon to review interconnection agreements negotiated by incumbent LECs and new entrants. Second, they are called upon to mediate negotiations that may have run into difficulties. Third, they are called upon to conduct binding arbitrations of issues presented to them by negotiating parties. Finally, they are called upon to review "Statements of Generally Available Terms" that might be filed by a BOC. In each case, federal standards apply, directly or indirectly. In resolving disputed matters presented for arbitration, Section 252(c)(1) requires the state commission to "ensure that such resolution[s] meet the requirements of section 251, ***including the regulations prescribed by the Commission pursuant to section 251.***" In order to disapprove an agreement following an arbitration (technically a separate step under the law), Section 252(e)(2)(B) requires the state commission to find that the agreement "does not meet the requirements of section 251, ***including the regulations prescribed by the Commission pursuant to section 251.***" Finally, a state commission may only approve a BOC's "Statement of Generally

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[9](...continued)
telecommunications industry." ***Notice*** at ¶ 1, ***quoting*** Joint Explanatory Statement at 1. The statute is designed to "open monopoly telecommunications markets to competitive entry" and to "ensure that a firm's prowess in satisfying consumer demand will determine its success or failure in the marketplace." ***Notice*** at ¶ 1. Indeed, if there were any possible doubt on this score, one need only consider the ***name*** that Congress gave to new Part II of Title II: "Development of Competitive Markets."

[10] The conclusion that this Commission may issue regulations that are binding on the states is confirmed by other provisions of the Act, including Sections 252(d), 252(g), 253, 254(f), and 261(c).

Available Terms" under Section 252(f)(2) if that statement "complies with ... section 251 ***and the regulations thereunder.***"[11]

B. The Commission's Regulations Under Section 251(d) Can And Should Address Pricing Standards.

The only possible debate about the scope of this Commission's authority to bind the states to the Commission's interpretation of Section 251 arises in the area of pricing standards.[12] This is because the detailed pricing standards themselves are contained not in Section 251, but in Section 252(d). Moreover, each of the provisions cited above (Sections 252(c)(1), 252(e)(2)(B), and 252(f)(2)), in addition to binding the

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[11] The question is slightly different for agreements reached through negotiations. Congress affirmatively concluded that two interconnecting parties may, if they choose, voluntarily agree to modify, waive or simply ignore the duties established in Section 251. If that occurs, then all that Congress has required is that the agreement be nondiscriminatory and in the public interest. ***See*** Sections 252(a)(1), 252(e)(2)(a). In this regard, Sections 251 and 252 reflect Congress's decision to rely in the first instance on party-to-party negotiations to establish interconnection arrangements. The role of the pro-competitive standards in those sections (and the Commission's implementing regulations) is to ensure that the negotiations are meaningful. This is accomplished by establishing certain minimum provisions to which parties seeking to interconnect with incumbent LECs will be entitled if the matter goes to arbitration. If, notwithstanding those provisions, a new entrant affirmatively chooses to demand less from the incumbent LEC than the new entrant would be entitled to, Congress was willing to accept that choice.

[12] All other questions about what Section 251 means — including what types of interconnection arrangements are technically feasible (Section 251(c)(2)(B)), what unbundled network elements must be supplied by incumbent LECs to new entrants (Sections 251(c)(3) and 251(d)(2)), and what restrictions state commissions may impose on resale offerings by incumbent LECs (Section 251(c)(4)(B)) — may clearly be addressed in the Commission's implementing regulations, and are clearly binding on the states in Section 252 proceedings. The Commission's authority under Section 251(d) is so clear on these matters that any claim that the states have any authority to adopt regulations that do not comply with those issued by the Commission is simply frivolous. Note, however, that under Section 261(c), state commissions may impose requirements regarding intrastate services "that are necessary to further competition in the provision of" local exchange service, "as long as [those] requirements are not inconsistent with [Part II of Title II] or the Commission's regulations to implement this part."

state commission to follow this Commission's regulations under Section 251, separately binds the state commission to follow "subsection (d)" of Section 252. Some commenters have seized upon this feature of the law as indicating that, at least in the area of pricing standards, state commissions, not this Commission, set the rules.[13]

Such a claim is not frivolous. It is, however, wrong. The reason is that this Commission's regulations under Section 251 will necessarily refer to the pricing standards in Section 252(d). Because, as shown above, those regulations are fully binding on state commissions, state commissions must faithfully apply this Commission's view of appropriate pricing standards in adjudicatory proceedings under Section 252.

There are three separate pricing standards in Section 252(d). Section 252(d)(1) addresses prices for "piece-part" interconnection arrangements and unbundled network elements. Section 252(d)(2) addresses prices for network-to-network interconnection, *i.e.*, prices for the mutual "transport and termination of traffic" delivered from one carrier to another. Section 252(d)(3) addresses the calculation of wholesale discounts for an incumbent LEC's retail services. In each case, however, the corresponding provision of Section 251 also refers to pricing issues.

Section 251(c)(2)(D) requires rates for interconnection arrangements to be "just, reasonable and nondiscriminatory, in accordance with ... section 252." Similarly, Section 251(c)(3) requires rates for unbundled network elements to be "just, reasonable and nondiscriminatory in accordance with ... section 252" Not only has Congress in Section 251(d)(1) directly required the Commission to issue regulations "to implement" these general pricing rules, it has pointed the Commission to the specific language of

[13] ***See, e.g.,*** NARUC Comments at 17 - 18; Comments of BellSouth at 48; Comments of Pacific Telesis Group at 13.

Section 252, presumably in order to ensure that the rules the Commission adopts under Section 251 fully comply with the pricing standards in Section 252(d).

With regard to resale, Section 251(c)(4) requires incumbent LECs to offer their retail telecommunications services to competing LECs "at wholesale rates." Again, under Section 251(d), the Commission is authorized and directed to establish regulations to implement this requirement. Here, Congress did not specifically and expressly require the Commission to refer to Section 252 in determining what "wholesale rates" would meet the terms of the statute. It would be bizarre indeed, however, to conclude that Congress, having laid out a pricing standard for wholesale rates in Section 252(d)(3), expected the Commission either to ignore that standard or, worse, to promulgate rules that were inconsistent with it. This Commission, therefore, may issue regulations regarding what wholesale rates meet the requirement of Section 251(c)(4); it must refer to Section 252(d)(3) in developing those regulations; and under Sections 252(c)(1), 252(e)(2)(B), and 252(f)(2) (discussed above), those regulations are binding on states in proceedings under Section 252.

Finally, with regard to network-to-network interconnection, Section 251(b)(5) imposes a duty on all LECs to "establish reciprocal compensation arrangements" for the exchange of traffic. Section 251(d) requires the Commission to establish regulations to implement that section, and, even though again there is no explicit reference to the pricing standards of Section 252, it would be bizarre to conclude that the Commission could or should ignore those standards. Indeed, buried in the applicable pricing standard (Section 252(d)(2)(B)(ii)) is a reference to the possibility of (and a specific ban on) ***this Commission*** engaging in certain types of proceedings to establish the appropriate network-to-network interconnection charges. As with wholesale rates, therefore, it is clear that this Commission may issue regulations regarding what constitutes an acceptable rate for traffic exchange; it is clear that those

regulations should be adopted with reference to the pricing standard in Section 252(d); and it is clear that those regulations, once adopted, are binding on the states.

Given that all this is true, the question remains as to why Congress took the trouble to separately refer to ***both*** the Commission's regulations under Section 251 ***and*** the pricing standards of Section 252(d) in defining the standards that state commissions are to apply in proceedings under Section 252. The undersigned associations submit that there are two reasons for this. First, Section 251(d)(1) necessarily left to the Commission the determination of precisely what regulations were needed "to implement the requirements of" Section 251. Congress did not want to prejudge the Commission's decision in this regard. But that meant that it was possible that state commissions would be confronted with issues under Section 252 without any guidance either from Congress or the Commission regarding what prices for various items were consistent with the purposes of Part II of Title II. From this perspective, Section 252(d), which provides the basic rules for state commissions to apply in those circumstances, is congressional "insurance" against an FCC decision to leave too much discretion to the states.[14]

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[14] This might also occur as an accident of timing. The 1996 Act became law on February 8, 1996. Under the negotiation/arbitration schedule of Section 252, a state commission could be confronted with the need to arbitrate a disputed interconnection agreement as soon as 135 days later, i.e., possibly as soon as June 22, with a final decision due no later than October 9, 1996. Yet this Commission's regulations under Section 251(d) are not due to be final until August 8 — a month and a half after arbitrations might begin. Moreover, under Section 252(f)(1), a BOC may at any time "prepare and file" a "Statement of Generally Available Terms" with a state commission, and Section 252(f)(3) requires the state commission's "review of such statement" to be "complete" "not later than 60 days after the date" it is submitted to the state commission. Although it appears that BOCs have generally chosen not to file such "statements" yet, as Congress was writing the new law, it was clear that any number of such 60-day proceedings could be called for prior to the date on which this Commission's implementing regulations are due to take effect. In these circumstances, it only makes sense that Congress would want to provide some specific pricing-related guidelines in the statute and to make those guidelines expressly applicable to state commission proceedings under Section 252.

Second, it is clear that Congress intended state commissions to undertake the complex and important task of ***adjudicating*** the compliance of particular proposed pricing regimes (whether in the context of an arbitrated agreement or included in a "Statement of Generally Available Terms") meet the requirements of the statute. Adjudication entails the application of rules to specific facts. The repeated injunctions in Section 252 for state commissions to apply both this Commission's regulations and the standards of Section 252(d), therefore, mean precisely that: in any particular case under adjudication, apply both. From this perspective, the fact that the rule of decision Congress imposed on state commissions refers both to this Commission's regulations and to the statute itself in no way implies that those regulations may flesh out the substantive requirements of Section 251 (which state commissions are also independently called upon to apply in Section 252 proceedings) but not the substantive requirements of Section 252.[15]

In this regard, the Supreme Court in ***Louisiana*** reaffirmed "the familiar rule of construction that, where possible, provisions of a statute should be read so as not to create a conflict," and, instead, to search for a reading of the statute that allows the various statutory provisions to be "naturally reconciled" to one another. 476 U.S. at 370. The undersigned associations submit that, to the extent some conflict is perceived between the Commission's rulemaking authority under Section 251(d) and the placement

[15] One can imagine a hypothetical case in which a state commission is convinced that some aspects of this Commission's rules regarding pricing actually conflict with the standards of Section 252(d). This will likely not be a problem in the longer run, since some party is virtually certain to seek judicial review of whatever rules this Commission adopts, so any alleged inconsistencies will be resolved in the courts. In the short run, a state commission should do what any adjudicator does when confronted with an apparent conflict in applicable legal principles: harmonize the apparent differences as best they can. If any affected party believes that the state commission has failed in its harmonization efforts, that party can appeal to federal court under Section 252(e)(6). Neither of these hypothetical situations even remotely constitutes a bar to this Commission issuing binding regulations regarding pricing standards.

of specific pricing standards in Section 252(d), the "natural reconciliation" of that conflict is as outlined above.

II. NEITHER *LOUISIANA PSC V. FCC*, NOR SECTION 2(B) OF THE COMMUNICATIONS ACT, NOR SECTION 601(c) OF THE 1996 AMENDMENTS, PREVENTS THE COMMISSION FROM ADOPTING REGULATIONS, BINDING ON THE STATES, TO IMPLEMENT SECTIONS 251 AND 252.

The discussion above established the following points: (1) Congress intended the Commission to have the authority to adopt regulations to implement the new duties for LECs under Sections 251(b) and 251(c); (2) the Commission's authority to adopt regulations includes regulations regarding the pricing standards with which incumbent LECs must comply in meeting those duties, and must consider Section 252(d) in doing so; and (3) those Commission regulations are fully binding on the states in the course of proceedings under Section 252. In short, Congress has chosen to pervasively occupy the field of establishing minimum rules for local exchange competition and directed this Commission to fill in the details, based on the directions given in the statute.

Nonetheless, some commenters have asserted that either Section 2(b) of the Act, or the Supreme Court's decision in ***Louisiana PSC v. FCC,*** or Section 601(c) of the Telecommunications Act of 1996, compel a different conclusion.[16] As described below, these commenters are mistaken.

[16] ***See, e.g.***, NARUC Comments at 9 - 15; MDPSC Comments at 13 - 25; NYDPS Comments at 5 - 11; Bell Atlantic Comments at 4 - 8.

A. A Finding That This Commission Has The Authority To Issue Regulations Implementing Sections 251 And 252 That Are Binding On The States Does Not Contravene Either Section 2(b) Of The Communications Act Or The Decision In *Louisiana PSC v. FCC.*

Section 2(b) establishes a general rule that the Commission has no authority to regulate intrastate services or the intrastate activities of telecommunications common carriers. ***Louisiana*** held that Section 220 (authorizing the prescription of depreciation rates for interstate carriers) did not trump Section 2(b) (which limits the Commission's authority over "intrastate" matters). That decision, of course, says nothing about the relationship of Section 2(b) to the scope of the Commission's authority under Part II of Title II, since Part II of Title II had not been enacted yet. All that ***Louisiana*** did was apply hornbook preemption law to the conflict between Section 2(b) and the Commission's attempt to set depreciation rates for intrastate assets.

Applying that same hornbook law to the situation at hand leads to a different result. The Court in ***Louisiana*** noted that "[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." 476 U.S. at 369. There can be no doubt that is exactly what Congress intended to do in enacting new Part II of Title II.

Section 2(b), which the Supreme Court found to be controlling over Section 220 in ***Louisiana,*** embodies a nearly absolute dividing line between interstate and intrastate services. The Commission had plenary authority over interstate services, but none over intrastate services. To the contrary, intrastate services were regulated under the terms of the public utilities laws of the various states. A party dissatisfied with a decision of this Commission would take the dispute to federal court, a party dissatisfied

with a decision of a state commission would take the dispute to state court. Within the realm of intrastate services, federal law had essentially nothing to say.[17]

Part II of Title II generally, and Sections 251 and 252 in particular, embody a radically different regulatory paradigm. This is evident from the profound differences between the legislative classifications that Section 251 imposes on the communications industry and those that existed under the pre-1996 Communications Act. As noted above, the old law drew a distinction between interstate and intrastate services and activities. Section 251, by contrast, establishes three new classes of carriers (telecommunications carriers, LECs, and incumbent LECs), defined without regard to traditional state/federal jurisdictional lines, then imposes new, federally-created duties on each of those classes of carriers, again defined without any concern for traditional state/federal jurisdictional lines.

The reason that the legislative classifications in Section 251 do not respect traditional state/federal jurisdictional lines is that it is inherently impossible to do so in light of the purpose of Part II. Under the traditional jurisdictional split, essentially all regulation of local exchange markets necessarily fell to the states, because — with the exception of exchange access services provided in connection with interstate long distance calls — essentially all local exchange activities are "intrastate" in nature. In enacting Part II, however, Congress indicated that it wanted to establish certain ***federal*** rules that apply ***directly*** to certain activities that would have been classified as

[17] The main exception is that even state regulators were bound by the terms of the federal Constitution, e.g., the Fifth Amendment's ban on setting rates at a level so low as to be confiscatory. Also, in a few individual, unusual circumstances, traditional principles of federal pre-emption let federal law intrude on state preserves. Examples of this preemption include this Commission's deregulation of customer premises equipment, *Computer and Communications Ind. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (Computer II), *cert denied*, 693 U.S. 198 (1983), and Judge Greene's order under the antitrust laws regarding the break-up of the old Bell System, *United States v. Western Electric Co.*, 552 F. Supp. 131, 153 - 159 (D.D.C. 1982).

"intrastate" under the old law. An inseparable part of Congress's decision to mandate competition in local exchange markets, therefore, is a decision to legislate in an area that federal law had not previously occupied.[18]

This means that the intrastate/interstate dichotomy embodied in Section 2(b) inherently cannot be applied in the context of Section 251 and Section 252. There is simply no way to interpret Section 251, for example, as applying only to "interstate" local exchange activities. That statute directly addresses, as a matter of federal law, issues such as restrictions on the resale of local exchange services; the provision of access to operator services, directory assistance, and white pages directory listings; obligations to interconnect for the mutual termination of local exchange traffic; and the availability of network elements for the provision of local exchange service. While a few of these services could be viewed as having certain interstate components under the old paradigm, Section 251 does not limit itself in that way.

Indeed, if there were any doubts about the inherent conflict between the statutory approach embodied in the new law and that embodied in Sections 251 and 252, those doubts are all dispelled by Section 252. Under Section 252, while state commissions have important functions to perform, in each case those functions primarily entail the application of ***federal*** law to matters related to interconnection agreements. Nothing under Section 2(b)'s interstate/intrastate paradigm contemplated a federal mandate that state commissions apply federal law. Indeed, under Section 252, a state

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[18] A federal decision to pervasively regulate in an area is one of the standard tests for federal preemption of state law, as the ***Louisiana*** court recognized. ***See*** 476 U.S. at 368-69. Prior to the 1996 Act, the question of whether to allow local exchange competition and, if so, the rules under which that competition would take place was a question of state law, because local exchange services were (and are) "intrastate" services under the traditional classification scheme. After the 1996 Act, these are matters of federal law: Local exchange markets shall be open to competition (Section 253) and competing LECs, particularly incumbent LECs, shall abide by certain federally-established rules of engagement in their competitive battles (Sections 251 and 252).

commission's determinations are not subject to appellate review by state courts. To the contrary, Section 252(e)(4) states that "[n]o state court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." Appellate review of state commission decisions is, in all cases, to "an appropriate federal District court" under Section 252(e)(5). There is no precedent for this type of arrangement under the traditional interstate/intrastate split used to regulate telecommunications common carriers.

Even more telling is the provision of Section 252(e) that directs this Commission to "assume the responsibility of" any state commission that "fails to act to carry out its responsibility" under Section 252. Under the traditional interstate/intrastate split embodied in Section 2(b), if a state chose not to undertake any particular regulatory responsibility regarding intrastate services, then, to that extent, those intrastate services were unregulated. Here, if a state will not accept the responsibility for applying the new federal law, then this Commission, an agency of the federal

government, will do so.[19] Again, there is no precedent for this kind of arrangement under traditional telecommunications common carrier law.[20]

These considerations are a complete answer to NARUC's claim that the states "must" have independent authority to issue regulations regarding the content of Section 251 and 252, including, possibly, regulations that differ from this Commission's regulations, because Congress considered and rejected a proposal to amend Section 2(b) to indicate that it did not apply to Part II of Title II.[21] The operation of Sections 251 and 252 simply do not implicate the traditional interstate/intrastate jurisdictional

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[19] This provision, by the way, is a complete answer to the New York Dept. of Public Service's claim that the federal appellate process established by Section 252(e) constitutes a violation of the Eleventh Amendment. NYDPS Comments at 5, n 2. "The eleventh amendment is generally recognized as a bar to suits against a State unless specifically overridden by act of Congress or unless a State has consented to be sued." *Envirotech Sanitary Systems, Inc. v. Shoener,* 745 F. Supp. 271, 275 (M.D.Pa. 1990) (footnotes omitted). In the case of Section 252(e), both of these situations are present. First, by the language " [i]n any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court," it is clear that Congress intended to specifically override this bar. Second, a state commission can avoid suit by simply failing to make a determination under Section 251 and allowing the FCC to assume this role. Therefore, by taking action on negotiated agreements under Section 251, the state is consenting to suit in federal district court.

[20] This is not to say that these types of jurisdictional arrangements are unprecedented at all, or even at this Commission. To the contrary, in the realm of cable television rate regulation, for example, the Basic Broadcast Tier (BBT) is subject to regulation by local franchising authorities, but that regulation must occur under the terms of rules this Commission issued under the Cable Act, and appeals of local franchising authority rate decisions go to this Commission (and then to federal court), with no necessary state court involvement. 47 U.S.C. § 543(a). And, this Commission will assume responsibility for regulating BBT rates in some instances. 47 C.F.R. §§ 76.913(a) and 76.933(d). Similarly, the process by which local governments franchise cable television operators involves a mix of localities operating under local law while at the same time subject to a number of binding federal requirements.

[21] NARUC Comments at 10.

division of responsibilities that Section 2(b) embodies, so no amendment of Section 2(b) was needed.

Moreover, to the extent that Part II of Title II ***does*** countenance a distinction between interstate and intrastate services, that distinction is preserved, subject at all times to the supremacy of federal law in the now-federalized area of local exchange competition. In other words, where it made sense to continue to apply the interstate/intrastate distinction in Section 2(b), Congress expressly continued to apply it. For example, Section 252(e)(3) expressly permits states in reviewing an interconnection agreement to enforce state-level requirements that may exist for LECs, to the extent such requirements are permissible under Section 253. Also, Section 253 itself — the express "preemption" provision — expressly permits states to establish various requirements for LECs, including new entrants, such as service quality, consumer protection, and universal service requirements. Those requirements, however, must not act as barriers to entry, and must be competitively neutral.[22] Similarly, Section 254(f) permits states to adopt rules and regulations regarding state-level universal service initiatives, as long as those rules and regulations provide for "equitable and nondiscriminatory" contributions to universal service costs by intrastate telecommunications carriers. Finally, Section 261(b) expressly contemplates that states

[22] While Section 253 does preserve some state authority, that section clearly establishes that the Commission, not the states, shall determine what state actions do, or do not, comply with the requirements of the new federal law. Under Section 253(d), the Commission "shall preempt the enforcement of" any state or local statute, regulation or other legal requirement that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," or that imposes universal service, public safety and welfare, or service quality requirements in a manner that is not "competitively neutral." Under this part of the law, if this Commission and a state commission disagree about whether a particular state or local requirement impedes competitive entry or is not "competitively neutral," this Commission wins. This statutory structure is inconsistent with the view that Congress intended the states to have any significant independent authority to determine what constitutes the minimum acceptable pro-competitive policies in each local exchange market throughout the country.

might adopt regulations "in fulfilling the requirements of" Part II of Title II, and Section 261(c) expressly contemplates that states might adopt "requirements for intrastate services that are necessary to further competition" in local exchange markets, as long as, in both cases, the state regulations are "not inconsistent with" Part II. In these circumstances, an amendment to Section 2(b) carving out Part II would have divested the states of more authority than necessary to accomplish Congress's purpose, and — the key point — divested them of more authority than Congress wanted to divest them of.

Indeed, for the vast majority of traditional regulatory activities, Congress did ***not*** want to divest state commissions of their traditional regulatory authority over intrastate activities. To this extent, the basic rule of Section 2(b) remains totally unaffected by the new law. State regulators continue to have the power to set the rates for intrastate services; to set the non-price terms and conditions associated with such services; to regulate matters such as accounting and other reporting requirements regarding intrastate operations; depreciation of assets assigned to the intrastate jurisdiction; billing practices for intrastate services; and customer service requirements; to establish intrastate mechanisms for the preservation of universal service; and, indeed, to decide whether to regulate intrastate services under a regime of traditional rate-of-return regulation, under some variant of price cap or "incentive" regulation, or under some other regulatory model.

What this recitation of these continued areas state authority shows is that, contrary to the implications of some commenters, neither Congress nor this Commission has engaged in a radical program to overthrow state authority to regulate intrastate telecommunications. State regulators' authority over intrastate services, and over the intrastate operations of local exchange carriers (LECs), is no less pervasive today than before the 1996 Act. The change from a presumption of monopoly local exchange markets, subject to state variations, to a federally-mandated presumption of robust competition is indeed dramatic. The fact remains, however, that the 1996 Act focused

on a relatively few areas that Congress believed to be critical to the development of such competition — interconnection, unbundling, resale, and fair access to monopoly facilities. It is only in these areas that Congress has occupied the field and assigned regulatory responsibility to this Commission. Nothing in this congressional action remotely conflicts with the general operation of Section 2(b), and nothing in Section 2(b) suggests that this Commission should be hesitant in fulfilling the responsibilities that Congress has placed on it.

When all is said and done, the ***Louisiana*** case, once again, supplies the correct rule for assessing the scope of the Commission's authority under Sections 251 and 252 to issue rules that are binding on the states:

> [T]he best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency.

476 U.S. at 373. Congress has granted this Commission the authority to take all steps necessary to implement Section 251. (Section 251(d)(1).) Congress has also explicitly stated that in the state-level adjudicatory proceedings called for by Section 252, state commissions shall conform their decisions to this Commission's regulations. (Sections 252(c)(1), 252(e)(2)(B), and 252(f)(2).) Congress included numerous other provisions in Part II of Title II that indicate that states no longer have unfettered discretion to issue regulations in certain areas that are relevant to the promotion of local exchange competition; instead, such regulations must comply with the terms of the new law and/or with Commission regulations issued under it. Clearly, therefore, Congress intended the new law and this Commission's regulations to pre-empt contrary state rules, and nothing in either Section 2(b) of the Act or in the ***Louisiana*** decision even remotely supports a contrary conclusion.

B. Section 601(c)(3) Of The 1996 Act Does Not Lead To A Different Conclusion.

In light of the foregoing discussion, it should be clear that Section 601(c)(1) of the 1996 Act is no bar to this Commission issuing regulations to implement Sections 251 and 252 that are fully binding on the states. That provision states: "No implied effect.—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law ***unless*** expressly so provided in such Act or amendments" (emphasis added). The most important reason that this provision does not interfere with the Commission's authority to issue under Section 251 that are binding on the states is that the Commission's authority to do so ***is*** "expressly so provided" for in various provisions of the Act.

First, Sections 252(c)(1), 252(e)(2)(B) and 252(f)(2) all expressly require that states apply this Commission's regulations in any proceeding under Section 252. Second, Section 251(d)(3), by carving out a narrow exception to the Commission's ability to "preclude the enforcement of any regulation, order or policy of a State commission," demonstrates that its rulemaking authority under Section 251(d)(1) generally encompasses the ability to "preclude" enforcement of such regulations, orders or policies. Third, Sections 261(b) and (c) require any state-level regulations designed to implement Part II of Title II with respect to intrastate services to be "not inconsistent" with either "the requirements of" Part II or "the Commission's regulations to implement" Part II. There is simply no rational way to conclude that Congress intended a general "no implied repeals" provision to trump these specific grants of regulatory authority to this Commission.[23]

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[23] One could conceivably argue that, in light of its inclusion of Section 601(c) in the 1996 Act, Congress should have scattered a phrase such as "any provision of state or local law to the contrary notwithstanding" throughout Part II of Title II to totally eliminate any possibility of doubt or ambiguity about its intent. But the more sensible conclusion is that (continued...)